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No. 87-1058

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

PETE A. MORRISON,
Petitioner,
v.

GENUINE PARTS COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Is it within the discretion of the District Court to consider the plaintiff's voluntary resignation as one factor, among others, which precludes an award of reinstatement to a position denied the plaintiff prior to his resignation, absent a separate finding of constructive discharge?

PARTIES

Respondent, Genuine Parts Company, is affiliated with the following companies which are not wholly-owned subsidiaries:

1. Balkamp, Inc.
   Incorporated in Indiana

2. Henry-Bell Enterprises, Inc.
   Incorporated under provincial laws of Alberta, Canada

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STATEMENT OF THE CASE

Pete Morrison was employed by Genuine Parts Company as assistant stockroom manager. When the stockroom manager's position became available, Mr. Morrison was not given the position. The individual awarded the position was younger than Mr. Morrison, who at the time was more than 50 years old. Within two weeks after he knew he was not going to be promoted to stockroom manager, Mr. Morrison resigned.

Morrison sued Genuine Parts, alleging the failure to promote him to have been in violation of the Age Discrimination in Employment Act ("ADEA"). He further claimed that his resignation was non-voluntary; that he had been constructively discharged.

At trial, the court directed a verdict in favor of the Company on the constructive discharge claim. The jury found for Morrison on his promotion claim. The trial court concluded that Genuine Parts acted wilfully under the standard that its agents knew of the existence of the ADEA. Back pay, liquidated damages and attorneys' fees were awarded Morrison. Reinstatement and front pay were denied by the District Court on a number of grounds, including the fact that Morrison had resigned shortly after learning that he was not to be promoted.

The United States Court of Appeals for the Eleventh Circuit affirmed the jury verdict and the findings of the trial court in all relevant respects, including the finding that Morrison's resignation was a factor which, *inter alia,* precluded an award of reinstatement or front pay. It is the affirming of this ruling which Morrison petitions.

SUMMARY OF ARGUMENT

Neither *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975) nor *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976) relieved United States District Courts of the discretion to fashion remedies in discrimination lawsuits on a case-by-case basis. Neither case dictated that any district court was bound to impose equitable remedies to the same extent that those courts are compelled to award traditional legal relief.

There is no conflict between circuits. The *Spagnuolo* decision is not contrary to the decision in the case at bar -- only the result is different. Moreover, the decision of the Eleventh Circuit is in harmony with decisions in other circuits which have addressed the issue.

ARGUMENT

I. THE RULING BELOW IS ENTIRELY CONSISTENT WITH THE DICTATES OF THE UNITED STATES SUPREME COURT'S INTERPRETATIONS OF THE PURPOSE OF FEDERAL ANTI-DISCRIMINATION LAWS.

Petitioner urges this Court to adopt an expansive reading of *Albemarle Paper Co. v. Moody, supra,* and *Franks v. Bowman Transportation Co., supra,* under which the federal district courts are stripped of their traditional discretion in matters of equity, and are bound to perform no more than ministerial functions in fashioning remedies for discrimination. This plainly was not the intent of the Court in these two cases.

Albemarle involved the question of a court's discretion in awarding back pay, a remedy specifically provided for in Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-5(g) (1970 ed., Supp. III), which provided:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may ... order such affirmative action as may be appropriate, which *may* include, but is not limited to, reinstatement or hiring of employees, *with or without back pay* ..., or any other equitable relief as the court deems appropriate. (Emphasis supplied.)

It was the interpretation of the term "may" and the phrase "with or without back pay" that the Court faced in deciding the propriety of the district court's withholding a back pay award in a case involving a discriminatory seniority system. The case was remanded with the lower court's discretionary powers intact, with direction from this Court that the employer's lack of bad faith was irrelevant to the determination of the propriety of an award of back pay.

In giving guidance to the United States Court of Appeals for the Fourth Circuit as to its review of subsequent decisions, this Court in *Albemarle* stated,

> [T]he standard of review will be the familiar one of whether the District Court was "clearly erroneous" in its factual findings and whether it "abused" its traditional discretion to locate "a just result" in light of the circumstances peculiar to the case ... . *On these issues of procedural regularity and prejudice,* the "broad aims of Title VII" provide no ready solution.

422 U.S. at 425, 426 (Emphasis supplied.) (Citation omitted.)

The decision in *Franks* is consistent with *Albemarle* in its reserved approach to infringing upon the traditional discretion of the district courts. *Franks* involved race-conscious failure to hire claims, with the propriety of awarding back pay and seniority to a class of unhired applicants at issue before this Court. In addressing the question of discretion, the Court in *Franks* made it clear that it was applying the principles enunciated in *Albemarle* but cautioned,

> We are not to be understood as holding that an award of seniority status is requisite in all circumstances. The fashioning of appropriate remedies invokes the sound equitable discretion of the district courts.

424 U.S. at 771. After deciding upon the facts of the case then before it that the failure to award seniority was error, the Court again offered a *caveat:*

> In holding that class-based seniority relief for identifiable victims of illegal hiring discrimination is a form of relief generally appropriate under § 706(g), we do not in any way modify our previously expressed view that the statutory scheme of Title VII "implicitly recognizes that there may be cases calling for one remedy but not another, and -- owing to the structure of the federal judiciary -- these choices are, of course, left in the first instance to the district courts." *Albemarle Paper,* 422 U.S., at 416.

424 U.S. at 780.

Thus, the cases upon which Petitioner relies for the proposition that the decision in the case at bar "violates the ... remedial purpose of the federal discrimination laws" stand more convincingly for the proposition that what the District Court and Court of Appeals did in the case at bar is entirely consistent with the dictates of this Court with regard to the function of the federal judiciary. In exercising its traditional discretionary powers in this case, the district court acted in total comportment with the guidance of this Court, as clearly demonstrated in the Memorandum Opinion appearing at page 5a of the Appendix to the Petition. Likewise, in affirming the lower court's decision, the Eleventh Circuit obviously correctly applied the standard recognized in *Albemarle*. As such, the asserted basis for review by this Court, i.e., inconsistency with the purpose of the ADEA, is without foundation.

II. THERE IS NO CONFLICT BETWEEN THE CIRCUITS.

A. THE HOLDING OF THE ELEVENTH CIRCUIT IN THE CASE AT BAR IS NOT INCONSISTENT WITH THAT OF THE FOURTH CIRCUIT IN *SPAGNUOLO V. WHIRLPOOL CORP.*, 641 F.2d 1109 (4th Cir. 1981) *cert. denied* 454 U.S. 860 (1981).

As with his reading of the *Albemarle* and *Franks* decisions, the Petitioner's reading of *Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109 (4th Cir. 1981) *cert. denied* 454 U.S. 860 (1981) is faulty.

In *Spagnuolo*, the plaintiff was demoted and was replaced by a younger man. The plaintiff resigned two months later to accept a job with a competitor of the defendant at a higher salary than he was paid in the position to which he had been demoted. Upon a finding of age discrimination in the demotion, reinstatement of the plaintiff to his former (pre-demotion) position was ordered.

On appeal, the defendant contended that it was error for the trial court not to have instructed the jury "that plaintiff could recover loss of salary only if it found that he had been 'constructively discharged' by Whirlpool." 641 F.2d at 1114. The Court of Appeals in *Spagnuolo* found no reversible error in the failure to give such an instruction since the district court did instruct on the plaintiff's duty to mitigate damages, and the fact that the plaintiff did leave to accept higher paying employment, concluding, "There was therefore no factual basis on which to submit the concept of constructive discharge to the jury." *Id.*

The defendant's attack upon the remedy of reinstatement in *Spagnuolo* was totally unrelated to the issue of constructive discharge. The appellate court in *Spagnuolo* assessed the issue thusly:

> Whirlpool vigorously attacks the equitable relief of reinstatement granted by the district court. It posits that plaintiff lacks the qualifications for the new position that was created by combining two managerships and that the animosities and tensions between the parties make reinstatement infeasible.

641 F.2d at 1114-1115.

Therefore, there is no basis upon which to compare the case at bar with *Spagnuolo* and to reach a conclusion that the decisions conflict. In *Spagnuolo,* the Fourth Circuit declared that "constructive discharge" was not an issue to the extent it was asserted on the question of back pay, and constructive discharge was never raised as an issue with regard to reinstatement. By comparison, in the case at bar, constructive discharge was a core issue throughout the proceedings and a specific and separate finding on that issue was made and entered by the trial court, and was presented to and affirmed by the Eleventh Circuit.

Thus, although the outcome of these two cases is dissimilar upon similar facts, the legal issues before the district and appellate courts were inapposite. As such, no conflict exists between the Fourth and Eleventh Circuits on principles of law, and the jurisdiction of this Court on that basis is improperly invoked.

B. THE HOLDING OF THE ELEVENTH CIRCUIT IN THE CASE AT BAR IS IN HARMONY WITH DECISIONS IN OTHER CIRCUITS WHICH HAVE ADDRESSED THE ISSUE.

The legal principle about which Petitioner complains has been applied in the same manner as applied in the case at bar by other circuit courts. For example, prior to the decision now before this Court, the United States Court of Appeals for the Eleventh Circuit, in *Wardwell v. School Board of Palm Beach County, Florida,* 786 F.2d 1554 (11th Cir. 1986) reviewed a hybrid failure to promote/constructive discharge case. Upon concluding that the district court erred in finding constructive discharge, the appellate court concluded, on petition for rehearing, that its "conclusion that the district court was clearly erroneous in finding a constructive discharge necessarily means that the injunction requiring reinstatement must be vacated." 786 F.2d at 1558.

In a similar case involving the hybrid issues of demotion and constructive discharge, the United States Court of Appeals for the Tenth Circuit in *Derr v. Gulf Oil Corp.,* 796 F.2d 340, 342 (10th Cir. 1986), after affirming the finding of unlawful discrimination in the demotion, but finding no constructive discharge, concluded that the plaintiff's back pay period ended with her resignation, and that the plaintiff was "not entitled to reinstatement if she was not constructively discharged."

The United States Court of Appeals for the District of Columbia Circuit has implicitly endorsed the principle in two separate opinions. In *Clark v. Marsh,* 665 F.2d 1168, 1173 (D.C. Cir. 1981), in a case involving a hybrid failure to promote and

constructive discharge, the court acknowledged the soundness of the employer's challenge to the award of reinstatement and back pay beyond the date of resignation, absent a finding of constructive discharge, wherein it noted:

> We readily agree that plaintiff's recovery for the period subsequent to her retirement must rest upon proof that she "was [not] the responsible agent in [her] own termination."

Id. at 1172.

In *Hopkins v. Price Waterhouse,* 825 F.2d 458, 472-473 (D.C. Cir. 1987), the hybrid question was one of failure to offer partnership and constructive discharge. Although the case was remanded to the district court on the ultimate issue of constructive discharge, the appellate court implicitly endorsed the trial court's determination that even if the denial of partnership was unlawful,

> If the plaintiff resigned voluntarily, and not because Price Waterhouse made working conditions intolerable and drove her to quit, she is not entitled to an order that she be made a partner.

Hopkins v. Price Waterhouse, 618 F.Supp. 1109, 1121 (D.D.C. 1985).

In another hybrid failure to promote/constructive discharge case, in which the district court concluded remedies had become moot with regard to relief for the failure to promote because of the plaintiff's resignation, the United States Court of Appeals for the Ninth Circuit offered the following guidance to the district court on remand of the constructive discharge issue:

> If the district court decides that there was a constructive discharge, relief granted by the district court will include a remedy for the discriminatory [failure to promote]. If the district court decides that there was no constructive discharge and Nolan's resignation was voluntary, the district court's mootness conclusion would be applicable.

Nolan v. Cleland, 686 F.2d 806, 814 (9th Cir. 1982). See also, *Gomez v. Great Lakes Steel Division, National Steel Corp.,* 803 F.2d 250, 256-7 (6th Cir. 1986) (In hybrid case, "If there is no actionable constructive discharge, Gomez cannot recover for those losses directly attributable to his voluntary decision to retire.")

Given this consistent adherence among the circuits to this legal principle, it is obvious that instead of a conflict existing, there is harmony within the circuits.

CONCLUSION

There being no inconsistency in the decision below with federal law or decisions of the United States Supreme Court, and no conflict between the decision and any other circuit court of appeals upon principles of law, there is no basis for assertion of jurisdiction by this court. Upon such grounds and upon the foregoing argument and authority, Respondent respectfully submits that the Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have this day served opposing counsel with a true and accurate copy of **BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT** by depositing same in the United States Mail, postage prepaid, addressed as follows:

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This 26th day of January, 1988.

GEORGE K. McPHERSON, JR.